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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ERIC MICHAEL DENBY, Defendant and Appellant.	G041017 (Super. Ct. No. RIF115687) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Paul E. Zellerbach, Judge. Affirmed.

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Heather F. Crawford, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Eric Michael Denby of the first degree murder of Emma O'Keith with the special circumstance the murder was committed during a kidnapping (Count 1) (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17)(B)) and the rape of Lorraine N. (Lorraine) in the course of kidnapping her (count 2) (Pen. Code, §§ 261, subd. (a)(2), 667.61, subd. (d)(2)) and of kidnapping her for the purpose of rape (count 3) (Pen. Code, § 209, subd. (b)(1)). After the jury fixed the penalty for count 1 at life without the possibility of parole, the court sentenced defendant to life without the possibility of parole for that count, a consecutive 25 years to life term for count 2, and a consecutive life term (with the possibility of parole) for count 3.

Defendant contends the court (1) committed prejudicial error by failing to instruct the jury with the standard kidnapping instruction for purposes of count 1; (2) erroneously admitted evidence of his prior sexual offenses; and (3) erroneously instructed the jury it could "rely on direct evidence to convict [him] even if that evidence was consistent with an innocent explanation." He also contends the prosecutor committed misconduct by eliciting victim impact evidence during the guilt phase of the trial. We affirm.

FACTS

Around midnight on February 10, 2002, Lorraine, a 56-year-old prostitute who lived in San Pedro, was walking along Pacific Avenue while working, when a man pulled up in front of her in a white medium-size car with cloth seats. The man was "young looking," Caucasian, "clean-cut," wore glasses, and had short hair, a long nose, and "kind of small eyes." Lorraine identified defendant at trial as this man.

Lorraine was under the influence of crack cocaine which made her "alert [and] more awake," and had also consumed "a 40-ounce bottle of beer" two or three

hours earlier. During the previous week, Lorraine had not slept except for catnaps because of her cocaine use.

Lorraine asked defendant if he was looking for a date and offered him oral sex for $30. Defendant agreed, so Lorraine "got in the car." Defendant told Lorraine his name was Eric.

Defendant drove onto the freeway, even though Lorraine told him she did not "want to go out of town." Defendant said he did not want to stay in town because he was on probation. After 15 to 20 minutes, he pulled off the freeway and went to an AM/PM store where he bought two cans of beer. He drank one and Lorraine drank the other.

Lorraine then suggested they go to a particular parking lot. Defendant parked there and offered Lorraine an extra $10 to get in the back seat and "let him do what he wanted to do." Lorraine took off her pants. Defendant put handcuffs on one of her wrists; she struggled to keep him from cuffing her other arm. She screamed; he told her to shut up and hit her several times.

Lorraine managed to get out of the car. She ran to the street, screaming, where she stopped a Lincoln Continental and begged the driver to let her in, but the driver "kept nodding his head, no." Defendant drove up and gestured with his arm for the Lincoln to leave.

Defendant grabbed Lorraine, dragged her to his car, and said "he was going to kill [her] if [she] yelled anymore." He held a screwdriver-like tool to her throat as he threatened her.

Defendant drove back onto the freeway and hit Lorraine over 10 times as he drove. He told her "to shut up, because [she] was crying a lot." He brought the screwdriver to her neck and again threatened to kill her. At his command, she removed her clothes and performed oral sex on him as he drove for about an hour. He said she had

"better not bite him, because the last girl that bit him, he killed her." She noticed scarring on his chest.

Lorraine's "mouth was real dry[, a]nd it was hard to give him sex," so she told him she was thirsty. He put the seat back flat and covered her with clothing. Unable to see, Lorraine heard him ask for directions from someone. He bought a bottle of water at a store, got back on the freeway, gave her a drink and told her "to give him some more head."

After about 20 or 30 minutes and after Lorraine had seen "a freeway sign saying Riverside," defendant drove onto an off-ramp and went up a dirt hill in a "very dark and secluded" area off the freeway. Defendant said, "'You know you are going to die, don't you?'", drove about two blocks, stopped the car, and told her to get out. He had sex with her vaginally and anally. He told her to get dressed. She "thought he was going to kill [her]."

He drove back onto the freeway. She was so exhausted she fell asleep. When she awoke, they were back in San Pedro and he said "he was going to take [her] home with him." Lorraine begged him to take her to her own home because she had left her grandchildren there with a neighbor. "So he dropped [her] off."

Lorraine did not report the incident to the police immediately because she "was absconding from parole, and . . . didn't want to go to jail." She had prior convictions for prostitution and possession of narcotics.

Six days later, on the morning of February 16, 2002, a dead body was found off the I-15 freeway near Lake Elsinore. Several hours earlier, at 5:41 a.m., Officer Bruce Smith had been "cruising that area" because it was an isolated, undeveloped area where stolen cars were frequently "abandoned and stripped." A white midsize car had driven past Smith. Smith had tried to remember the car's license plate and had typed the number, 4PBX651, into his vehicle's computer terminal.

The corpse was that of Emma O'Keith, a 59 or 60-year-old prostitute whose last known address was in San Pedro and who had last been seen walking near Pacific Avenue the previous night (February 15, 2002) between 7:00 and 9:00 p.m. A forensic pathologist determined the cause of O'Keith's death was a stab wound to her back. She had also suffered a dislocated knee, a fractured rib, and other injuries, but no life-threatening injuries to her face.

Lorraine's boyfriend told her about O'Keith's murder and that the police wanted to talk with Lorraine. Lorraine gave the police the unwashed pants she had worn on the night of February 10, 2002. An officer showed Lorraine a photo lineup that included a suspect located by police based on the license plate number recorded by Smith (and the only suspect at that time). Lorraine picked the suspect as someone who looked "similar" to her assailant, but was uncertain about her identification, because the assailant had worn glasses.

Department of Motor Vehicles records showed defendant owned a Nissan Maxima with the license plate number, 4PBX561, on February 10 and 16 of 2002. (The only variance between this license plate number and the one recorded by Smith on February 16 was the order of the digits 5 and 6.) The Maxima had been received by an auto dismantler on September 13, 2002. By the time the police tracked down the car much later, "it was already in pieces."

On December 21, 2002 (about 10 months after the February incidents), Mary M., who lived at the Pacific View board and care house in San Pedro, approached a man walking past Pacific View and tried to sell him a radio for $5. The man offered her $30 to walk with him a short way. Believing the man wanted sex, Mary suggested "a place that was familiar to" her, but he took her instead to an upstairs corridor in a secluded location. He grabbed her throat, pulled her "back pretty hard and said, 'Now I'm going to rape you and kill you.'" He vaginally raped her, then forced oral sex on her

until she threw up. He told her to wait there for 10 minutes and then he left. Unable to find her clothes, Mary walked back nude to the board and care.

On a night around January 16, 2003, Renee B., who also lived at the Pacific View board and care house in San Pedro (along with other people with "mental problems"), was sitting on a park bench in front of a bar after having "smoked cocaine or speed" that day. A man walked up and asked her to walk with him. They walked to the San Pedro boat docks where they were "out of everyone's sight." He pushed her down. She screamed. He had vaginal and anal sex with her against her will. At this point, the police arrived after receiving a report from security guards who had heard a woman screaming. The assailant ran away, but the police caught and handcuffed him.

Defendant entered a no contest plea to charges he sexually assaulted Mary and Renee.

Almost a year after Lorraine was raped and O'Keith killed, Lorraine was shown a photo lineup of people wearing glasses that included defendant. She identified another person and did not recognize defendant.

Testing in May 2003 revealed that defendant's DNA matched DNA found in semen taken from O'Keith's vagina and Lorraine's pants. A July 2003 search of defendant's residence uncovered "a T-shaped-type tool with a black plastic handle and . . . a sharp tip at the end" with "dark stains on it and some type of either hair or fibers attached to it," "a straight T-shaped tool" that could be used as a tire punch, and a pair of handcuffs.

In March 2004, the People charged defendant by complaint with crimes against O'Keith and Lorraine. Count 1 of the subsequent information filed in June 2005 charged defendant with the first degree murder of O'Keith and the special circumstances that the murder was committed during a kidnapping and a rape and while defendant was lying in wait. Counts 2 through 5 concerned Lorraine. In count 2, the People charged defendant with raping Lorraine and alleged he kidnapped her, personally used a

dangerous weapon, and tied her up. Count 3 charged defendant with kidnapping Lorraine in order to commit rape. Counts 4 and 5 charged him with oral copulation by force, and rape with an instrument, respectively.

Before the preliminary hearing, Lorraine was shown a photo of defendant's lower abdomen and "readily identified [his] scars as being the scars that she had seen when she was abducted." Lorraine identified defendant at the preliminary hearing and at trial.

At trial, Tiffany Amalfitano testified she lived with defendant in San Pedro "in the early part of 2002." Her father gave him a white Nissan Maxima with cloth seats. Defendant would go out driving between approximately 11:00 p.m. and 4:00 a.m. Amalfitano did not know what defendant did while he was out driving.

Kristi Medearis, defendant's girlfriend in 2002, testified that he wore glasses, drove a white car, had a cabin in Lake Elsinore, and would handcuff her hands when they had sex. Defendant told Medearis he had picked up an African-American woman near "Pacific," argued with her, "used bungee cords around the headrest to restrain her," and drove her to Riverside. During a struggle, the woman's leg had been slammed in the car door. Defendant killed her after she threatened to call the police. He first tried to strangle her, then inserted a tire iron in her eye socket, then used "an air jack, a cable-type tool to continue to strangle her." Defendant asked Medearis if she would still love him if the story were true, then said he did not do it and was simply seeing what she would say. Medearis confirmed defendant had bungee cords and an air jack in his car.

Also at trial, both Renee and Mary identified defendant as looking like the man who raped them.

The jury returned its verdict. On count 1, the jury found defendant guilty of the first degree murder of O'Keith, and further found the murder was committed during a

kidnapping (but not a rape).[1] On count 2, the jury found defendant raped and kidnapped Lorraine, and the kidnapping substantially increased the risk of harm to her. On count 3, the jury found defendant guilty of kidnapping Lorraine for purposes of rape. The jury acquitted defendant on counts 4 and 5.

DISCUSSION

Defendant Was Not Prejudiced by the Court's Failure to Instruct the Jury on the Elements of Kidnapping for Purposes of the Felony Murder Rule and the Kidnapping Special Circumstance

Defendant contends the court violated his "state and federal rights to due process and a jury trial by failing to instruct the jury on the elements of kidnapping" for purposes of the felony murder rule and the kidnapping special circumstance. Defendant asserts the error was prejudicial, noting "the issue of kidnapping was a central and contested one."

A trial court bears a sua sponte duty to instruct the jury on the elements of a felony underlying a felony murder theory of liability (*People v. Cain* (1995) 10 Cal.4th 1, 36 (*Cain*)) and the elements of a special circumstance allegation (*People v. Williams* (1997) 16 Cal.4th 635, 689). "'[A]ssertions of instructional error are reviewed de novo.'" (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469.) A trial court's failure to instruct the jury on all elements of an offense is a constitutional error "subject to harmless error analysis under both the California and United States Constitutions." (*People v. Flood* (1998) 18 Cal.4th 470, 475 (*Flood*).) Under the federal Constitution, the standard is whether the instructional error was harmless beyond a reasonable doubt under *Chapman*

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[1] According to the People, the lying in wait special circumstance was apparently dismissed at trial. At the preliminary hearing, defendant was not held to answer for this special circumstance because the court found insufficient supporting evidence.

v. California (1967) 386 U.S. 18. (*Flood*, at p. 504.) In determining whether instructional error was harmless, relevant inquiries are whether "the factual question posed by the omitted instruction necessarily was resolved adversely to the defendant under other, properly given instructions" (*id*. at p. 485), and whether the "defendant effectively conceded the issue." (*Id.* at p. 504.) A reviewing court considers "the specific language challenged, the instructions as a whole[,] the jury's findings" (*Cain*, *supra*, 10 Cal.4th at p. 36), and counsel's closing arguments to determine whether the instructional error "would have misled a reasonable jury . . . ." (*Id*. at p. 37.)

The People concede the court "may have erred in not specifically instructing the jury on the underlying kidnapping crime," but argue "no prejudice resulted because the elements of kidnapping were before the jury under other properly given instructions" and "the parties' closing arguments . . . ."

On the felony murder rule and the kidnapping special circumstance, the court instructed the jury with Judicial Council of California Criminal Jury Instructions (2006-2007), CALCRIM No. 540A and CALCRIM No. 731, respectively, and instructed the jurors to "please refer to the separate instructions that I will give you on" the underlying crime of kidnapping, in order to "decide whether the defendant committed a kidnapping."

Although CALCRIM Nos. 540A and 731 contained a warning, embedded in the form instruction, admonishing the court to "MAKE CERTAIN THAT ALL APPROPRIATE INSTRUCTIONS ON ALL UNDERLYING FELONIES ARE GIVEN," the standard instruction on kidnapping, CALCRIM No. 1215, was not given. (Apparently, neither party requested the standard kidnapping instruction, nor did the court give it sua sponte.) CALCRIM No. 1215 states in pertinent part: "To prove that the defendant is guilty of [kidnapping], the People must prove that: [¶] 1. The defendant took, held, or detained another person by using force or by instilling reasonable fear; [¶] 2. Using that force or fear, the defendant moved the other person . . . a substantial

distance; . . . [¶] 3. The other person did not consent to the movement[; and] [¶] 4. The defendant did not actually and reasonably believe that the other person consented to the movement." "Consent may be withdrawn. If, at first, a person agreed to go with the defendant, that consent ended if the person changed his or her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant."

The court did provide the jury with a substantially similar, but more expanded, definition of kidnapping when it instructed the jury with CALCRIM No. 1203 on the elements of kidnapping for the purpose of rape, as follows: "The defendant is charged in Count 3 with kidnapping Lorraine . . . for the purpose of rape . . . . [¶] To prove that the defendant is guilty of this crime, the People must prove that: One, the defendant intended to commit a rape . . . ; [¶] Two, acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear; [¶] Three, using that force or fear, the defendant moved the other person . . . a substantial distance; [¶] Four, the other person was moved . . . a distance beyond that merely incidental to the commission of a rape . . . , [¶] Five, the other person did not consent to the movement; and [¶] Six, the defendant did not actually and reasonably believe that the other person consented to the movement." "Consent may be withdrawn. If, at first, a person agreed to go with the defendant, that consent ended if the person changed her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant."

The court also instructed the jury with CALCRIM No. 3175 on kidnapping as a sentencing factor in sex offenses as follows: "[I]f you find the defendant guilty of any of the crimes charged in Counts 2, 4 and 5, you must then decide whether for each crime[,] the People have proved the additional allegation that the defendant kidnapped Lorraine . . . , increasing the risk of harm to her. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime. [¶] To prove this allegation, the People must prove that: [¶] One, the defendant took,

held, or detained Lorraine . . . by the use of force or by instilling reasonable fear; [¶] Two, using that force or fear, the defendant moved Lorraine . . . ; [¶] Three, the movement of Lorraine . . . substantially increased the risk of harm to her beyond that necessarily present in the rape . . . of Lorraine . . . ; and, [¶] Four, Lorraine . . . did not consent to the movement; and, [¶] Five, the defendant did not actually and reasonably believe that Lorraine . . . consented to the movement."

Thus, CALCRIM Nos. 1203 and 3175 contain the same elements for the crime of kidnapping as the standard instruction, CALCRIM No. 1215 (which was not given), except that CALCRIM No. 1203 contains two additional elements, i.e., that the defendant intended to commit rape and moved the victim a greater distance than was incidental to the rape, and CALCRIM No. 3175 contains the additional element that the movement of Lorraine increased the risk of harm to her.[2]

In the prosecutor's closing argument, he told the jury (with respect to the felony murder rule) to "look at the kidnapping instruction" for the definition of kidnapping, adding, "The basic idea of kidnapping, there is a little more to it, is that a person is forced to move a considerable distance against their will by force or fear." "[L]et's talk about whether or not [the murder] was in the course of kidnapping. Did he take her from her home area[,] from the place that she plied her trade? . . . Was there any way that she would have agreed to that?"

The prosecutor then discussed the special circumstance findings the jury would be asked to make, including whether O'Keith was kidnapped "as a part of" a rape: "[W]as she moved against her will? Was she moved a substantial distance? And so forth."

In defense counsel's closing argument, he argued that O'Keith, rather than being kidnapped, may have agreed, for a price of $100, to get in the car and drive with

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[2] When reading CALCRIM No. 3175 to the jury, the court (apparently inadvertently) omitted the requirement the victim be moved a substantial distance.

defendant to Riverside to "perform sex acts," because she was a 60-year-old prostitute "addicted to crack cocaine."

In rebuttal, the prosecutor argued that "three separate times [the jury had received] a definition of kidnapping, because we use kidnapping . . . in various places here: One as [to the] felony murder rule, one as a special circumstance, and one as a charge by itself having to do with Lorraine . . . ." (He was mistaken about the jury receiving kidnapping instructions as to the felony murder rule and the special circumstance.) The prosecutor then referred to a part of the kidnapping definition that had "to do with kidnapping for the purpose of rape," an obvious reference to CALCRIM No. 1203: "[T]his part, No. 2, . . . relates to all of the kidnappings in this case." "Acting with that intent, the defendant took, held, or detained another person." "It doesn't have to be at the time of the taking. A kidnap is also if you hold or detain . . . another person by using force or by instilling a reasonable fear. [¶] What that means is if Emma O'Keith got in the car willingly, I don't think it's reasonable and there is absolutely no evidence that she was offered $100 to be driven to Riverside County." "[W]e know at the very least that she was detained against her will, which is kidnapping. . . . [N]o one would want to go out to that remote area, 60, 70 miles away from their home and where they plied their trade." "She had her knee dislocated. She had multiple injuries to her, virtually on the verge of torture. . . . During that time, she was being held obviously against her will. . . . [¶] That meets the definition of kidnapping, because kidnapping is taking or holding or detaining a person against their will and moving them a considerable distance."

Thus, the prosecutor argued that the kidnapping definition in CALCRIM No. 1203 applied to all "the kidnappings in this case." CALCRIM No. 1203 provided the jurors with all the elements of kidnapping, plus two elements regarding rape. Thus, it is evident that the jurors necessarily relied on CALCRIM No. 1203 or 3175 for the definition of kidnapping for purposes of the murder charge. They were, after all,

instructed to "refer to the separate instructions" on kidnapping, and these were the only separate instructions that defined kidnapping.

But defendant argues the jury, in considering count 1, could not have applied CALCRIM No. 1203's kidnapping elements to fill in the instructional void, because CALCRIM No. 1203 specifies it applies to count 3, and jurors are presumed to follow the instructions given them. But the jurors were also given instructions on the felony murder rule and the kidnapping special circumstance which directed them to refer to "separate instructions" for the definition of kidnapping. We presume the jury followed these instructions (*People v. Adcox* (1988) 47 Cal.3d 207, 253), and referred to CALCRIM Nos. 1203 and/or 3175, which each contained a kidnapping definition.

It is not reasonably likely the jury misunderstood the law regarding kidnapping as an underlying felony for purposes of the felony-murder rule or as a special circumstance. (*People v. Kelly* (1992) 1 Cal.4th 495, 527.) The error was harmless beyond a reasonable doubt under *Chapman v. California*, *supra*, 386 U.S. 18.

The Court Properly Admitted into Evidence Renee's and Mary's Testimony on Defendant's Other Sexual Offenses

Prior to trial, the court ruled the testimony of Renee and Mary (on the sexual assaults to which defendant had pleaded no contest) was admissible under Evidence Code section 1108.[3] Defendant contends the court's ruling violated his state and federal due process rights because (1) section 1108 permits the "admission of prior sexual offenses to prove a defendant's propensity to commit similar acts," and (2) a related jury instruction, CALCRIM No. 1191, told the jury "it could rely on this [propensity] evidence to convict [defendant] even if it had only been proven by a preponderance of the evidence." Our Supreme Court has rejected these arguments in *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*) and *People v. Reliford* (2003) 29

[3] All further statutory references are to the Evidence Code.

Cal.4th 1007 (*Reliford*). Defendant raises these arguments "here to preserve his rights to further review."

Under section 1101, character evidence is inadmissible when offered to prove a defendant's "conduct on a specified occasion," with the exception of "evidence that a person committed a crime . . . when relevant to prove" a defendant's motive, intent, plan, identity, belief that a victim consented to an unlawful sexual act, or some other fact besides the defendant's disposition to commit such an act.

Under section 1108, subdivision (a) in "a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by "Section 1101, if the evidence is not inadmissible pursuant to Section 352." For purposes of section 1108, "sexual offense" includes rape under section 261. (§ 1108, subd. (d)(1)(A).)

The court instructed the jury with CALCRIM No. 1191 as follows: "The People have presented evidence that the defendant committed the crimes of rape, forcible oral copulation, and forcible sodomy that were not charged in this case. . . . [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offenses. . . . [¶] . . . [¶] If you decide that the defendant committed any of these uncharged offenses, you may but are not required to conclude from the evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit rape . . . . [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider, along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of rape . . . . The People must still prove each element of every charge beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose except for the limited purpose of determining the credibility of Renee . . . and Mary . . . ."

In *Falsetta, supra*, 21 Cal.4th 903, the defendant raised a due process challenge to section 1108. Our Supreme Court held "section 1108 is constitutionally valid" because, although it "represents a deviation from the historical practice of excluding such 'propensity' evidence [citation], the provision preserves trial court discretion to exclude the evidence if its prejudicial effect outweighs its probative value . . . ." (*Falsetta*, at p. 907.)

In *Reliford, supra*, 29 Cal.4th 1007, our Supreme Court found "no constitutional error in the 1999 version of" CALJIC No. 2.50.01. (*Id.* at p. 1016.) The 1999 version of CALJIC No. 2.50.01 was substantially similar to CALCRIM No. 1191, except that CALJIC No. 2.50.01 lacked CALCRIM No. 1191's caveats that a defendant's commission of uncharged offenses "is only one factor to consider" and that the "People must still prove each element of every charge beyond a reasonable doubt."[4] Viewing CALJIC No. 2.50.01 together with "other instructions the jury received" (*id*. at p. 1013), *Reliford* did "not find it reasonably likely a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard of proof. Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant

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[4] "The 1999 revised version of CALJIC No. 2.50.01, as modified [by the trial court in *Reliford*], provided: [¶] 'Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in the case.' [¶] . . . [¶] 'If you find that the defendant committed a prior sexual offense. . . , you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused.' [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense. . . , that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime. The weight and significance of the evidence, if any, are for you to decide. [¶] 'You must not consider this evidence for any other purpose.'" (*Reliford, supra,* 29 Cal.4th at pp. 1011-1012.)

committed a prior sexual offense. . . . The instructions instead explained that, in all other respects, the People had the burden of proving defendant guilty 'beyond a reasonable doubt.'" (*Id.* at p. 1016.)

We are bound by the decisions of the California Supreme Court in *Falsetta* and *Reliford*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The court did not err by admitting evidence of the uncharged crimes against Renee and Mary.[5]

The Jury Instructions on Circumstantial Evidence Did Not Violate Defendant's Constitutional Rights

Defendant argues the jury instructions given on circumstantial evidence in this case "effectively told the jurors not only that direct evidence did *not* have to be proven beyond a reasonable doubt, but that they could rely on direct evidence to convict *even if that evidence was consistent with an innocent explanation*." He contends the DNA on Lorraine's pants was "extremely incriminating" direct evidence, but was nonetheless consistent with "an entirely innocent explanation" that he had consensual sex with Lorraine sometime between February 10 and 21, 2002, but Lorraine, being "drunk

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[5] Because the uncharged crimes evidence was admissible under section 1108, we need not address defendant's contention the court improperly ruled the evidence admissible under section 1101, since any error would be harmless under either the federal or state standard. (*Chapman v. California, supra,* 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Defendant argues any error was not harmless because the jury was instructed as to section 1108 that "the other crimes evidence was simply 'one factor to consider' which was 'not sufficient by itself' to prove guilt." He asserts "under section 1101, the jury was told it *could* rely on the other crimes evidence to infer every single fact needed for conviction: identity, intent and motive." He is mistaken. As to section 1101, the jury was instructed with CALCRIM No. 375, which contains the following proviso: "If you conclude that the defendant committed any of the uncharged offenses, that conclusion is only one factor to consider, along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of any of the charged offenses. The People must still prove each element of every charge beyond a reasonable doubt."

and high on a regular basis," "did not realize it." He concludes the instructions violated his constitutional rights to due process and a jury trial.

We need not address this contention beyond noting that the DNA evidence here constituted circumstantial evidence, not direct evidence. The presence of defendant's DNA on Lorraine's pants was *not* direct evidence that he raped her or that he even had sex with her at all. (§ 410 ["'direct evidence' means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact"].)

The Prosecutor Did Not Commit Misconduct During the Guilt Phase of Trial by Eliciting Victim Impact Evidence Regarding the Death of O'Keith's Mother

Defendant contends "the prosecutor elicited from two guilt phase witnesses the fact that O'Keith's mother died just over three months after the homicide in this case," testimony that suggested the mother's "death was caused, or at least hastened, by what happened to her daughter." He argues this evidence was "irrelevant to the guilt phase" and prejudiced him under any standard because it "encouraged the jurors to rely on passion and sympathy in a case where the evidence was weak."

During the trial's guilt phase, the following colloquy ensued between the prosecutor and Nicole Cade, the girlfriend of O'Keith's grandson (Joshua Jones) and the mother of two of Jones's children:

"Q. You mentioned that sometimes [O'Keith] would stay with her mother. Is that Miss Stewart?

"A. Yes."

"Q. Okay. Is she an elderly lady?

"A. She was.

"Q. Is she gone now?

"A. Yes.

"Q. Okay. Is that fairly recent?

"A. Three months and 13 days after Emma [O'Keith] died, she died."

Also during the trial's guilt phase, the following colloquy ensued between the prosecutor and Jones:

"Q. When did you find out about [O'Keith's] death and how did you find out?

"A. My great grandmother, [O'Keith's] mother, . . . called me and told me. . . .

"Q. And then did Miss Stewart die soon thereafter?

"A. Yes, about three months after that."

Victim impact evidence relates "to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family." (*Payne v. Tennessee* (1991) 501 U.S. 808, 817.) Such evidence, "admissible at the penalty phase of capital trials" (*People v. Taylor* (2001) 26 Cal.4th 1155, 1171), has also been held to be admissible during the guilt phase under certain circumstances, e.g., if "relevant to the charged crimes," or if "[c]onsistent with the evidence and theory of the People's case." (*People v. Frye* (1998) 18 Cal.4th 894, 975, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390.)

Asking "questions calling for inadmissible and prejudicial answers" is a form of prosecutorial misconduct. (*People v. King* (1968) 266 Cal.App.2d 437, 464.) Another type of prosecutorial misconduct involves a prosecutor's "direct and deliberate attempts [during closing argument] to bring into the determination known or suspected prejudices of jurors, or to arouse their passions of hatred or fear to a point that makes fair consideration of the evidence unlikely." (5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) § 594, p. 851.) A prosecutor also commits misconduct by urging jurors in closing argument during the guilt phase of trial to consider or imagine the feelings and sufferings of the victim. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1056-1057 (*Stansbury*), reversed on another ground in *Stansbury v. California* (1994) 511 U.S. 318.)

Such conduct violates the federal Constitution if "it infects the trial with such unfairness as to make the conviction a denial of due process" (*People v. Morales* (2001) 25 Cal.4th 34, 44); it is reversible error unless the reviewing court finds beyond a reasonable doubt the misconduct did not affect the verdict. (*People v. Pigage* (2001) 112 Cal.App.4th at p. 1375.) Conduct not enjoined by the federal Constitution still contravenes state law if the prosecutor uses "deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales*, *supra*, 25 Cal.4th at p. 44.) Misconduct under state law mandates reversal if there is a reasonable probability a result more favorable to the defendant would have occurred absent the error. (*People v. Pigage, supra,* 112 Cal.App.4th at p. 1375.) "[O]nly misconduct that prejudices a defendant requires reversal [citation], and a timely admonition from the court generally cures any harm." (*Ibid*.)

Defendant has forfeited this issue on appeal because his trial counsel failed to object to any of the prosecutor's questions and Cades's and Jones's testimony on Stewart's death, and "any harm arising from them could have been cured by an admonition." (*Stansbury, supra,* 4 Cal.4th at p. 1056.) But even "if defendant had preserved his claims, we would find no reversible error." (*Ibid.*) The prosecutor's eliciting testimony about the death of O'Keith's mother did not infect the trial with unfairness or represent a deceptive or reprehensible attempt to persuade the jury. The testimony was a small part of this case and unlikely to arouse the jury's sympathy or passion. Defendant does not contend the prosecutor mentioned Stewart's death in closing argument or that the prosecutor ever "appeal[ed] to the jury to view the crime through the eyes of the victim," as in *Stansbury*. (*Id.* at p. 1057.)

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O’LEARY, J.